SUPREME COURT, U. S.

No. 1271

MAR 2 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

SUNDACO, INC., ET AL., *Appellants,*

v.

THE STATE OF TEXAS, ET AL., *Appellees.*

On Appeal From the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas

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JURISDICTIONAL STATEMENT

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March 1970

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JURISDICTIONAL STATEMENT

Appellants Sundaco, Inc., M.N. Landau Stores, Inc., and Joseph Piper appeal from a judgment of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas, which sustained against federal constitutional challenge the validity of a state statute under ~~which~~ state and local authorities seek to prohibit the appellants and their employees from engaging in business activities on consecutive Saturdays and Sundays.

OPINION BELOW

The trial court, the 42d District Judicial District Court of Taylor County, Texas, did not write an opinion. The opinion of the Court of Civil Appeals of Texas is reported at 445 S.W.2d 606 and is printed in Appendix A to this Statement (pp. 1a-6a, *infra*).

JURISDICTION

This is a proceeding in which the appellants defended against a suit to enjoin conduct of their businesses on consecutive Saturdays and Sundays on the ground that the statute pursuant to which state and local authorities were proceeding against them was invalid under, among other things, provisions of the United States Constitution. The trial court granted summary judgment to appellants on the ground that the statute "is vague, and indefinite, and therefore unconstitutional." (Tr. 130).[1] The Court of Civil Appeals of Texas, in a judgment (p. 7a, *infra*) disposing finally of appellants' federal constitutional claims, reversed the trial court and upheld the validity of the statute. The Court of Civil Appeals' judgment was entered on August 29, 1969. A timely filed motion for re-

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[1] "Tr." citations are to the transcript of record in the 42d District Court of Taylor County, the trial court, which was the record in the Court of Civil Appeals. When the term "appellants" is used, the reference is to the corporate appellants Sundaco, Inc., and M. N. Landau Stores, Inc. Joseph Piper, an employe, is also an appellant; his plea in abatement was granted by the trial court, and the judgment as to him may have been included in the notice of appeal to the Court of Civil Appeals. (Tr. 90, 134-36). The Court of Civil Appeals did not deal specifically with his case. He is an appellant here to be certain that any judgment of reversal entered by this Court would inure to his benefit in case the appellees do not consider his case closed by the trial court's original order granting his plea in abatement.

hearing was denied on September 26, 1969. The Supreme Court of Texas denied a timely-filed application for a writ of error on November 5, 1969, and a motion for rehearing of its denial on December 3, 1969. A notice of appeal to this Court was filed in the Court of Civil Appeals on February 2, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). Cases that sustain the jurisdiction of this Court include *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-95 (1962); *Mayflower Farms, Inc.* v. *Ten Eyck*, 297 U.S. 266 (1936); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964).

STATUTES INVOLVED

Article 286a of the Texas Penal Code, Vernon's Ann. P.C. art. 286a, is set out below. Articles 283, 284, 285, 286 and 287 of the Texas Penal Code are set out in Appendix A to the Jurisdictional Statement in *Spartan's Industries, Inc.* v. *Texas*, No. 1255 of this Term.

VERNON'S ANNOTATED PENAL CODE OF TEXAS

Art. 286a. Sale of goods on both the two consecutive days of Saturday and Sunday

Prohibition of sales; items; misdemeanor

Section 1. Any person, on both the two (2) consecutive days of Saturday and Sunday, who sells or offers for sale or shall compel, force or oblige his employees to sell any clothing; clothing accessories; wearing apparel; footwear; headwear; home, business, office or outdoor furniture; kitchenware; kitchen utensils; china; home appliances; stoves; refrigerators; air conditioners; electric fans; radios; television sets; washing machines;

driers; cameras; hardware; tools, excluding non-power driven hand tools; jewelry; precious or semi-precious stones; silverware; watches; clocks; luggage; motor vehicles; musical instruments; recordings; toys; excluding items customarily sold as novelties and souvenirs; mattresses; bed coverings; household linens; floor coverings; lamps; draperies; blinds; curtains; mirrors; lawn mowers or cloth piece goods shall be guilty of a misdemeanor. Each separate sale shall constitute a separate offense.

Sales for charitable and funeral or burial purposes; real property sales

Sec. 2. Nothing herein shall apply to any sale or sales for charitable purposes or to items used for funeral or burial purposes or to items sold as a part of or in conjunction with the sale of real property.

First offense; subsequent convictions; penalties

Sec. 3. For the first offense under this Act, the punishment shall be by fine of not more than One Hundred Dollars ($100.00). If it is shown upon the trial of a case involving a violation of this Act that defendant has been once before convicted of the same offense, he shall on his second conviction and on all subsequent convictions be punished by imprisonment in jail not exceeding six (6) months or by a fine of not more than Five Hundred Dollars ($500.00); or both.

Purpose; public nuisances; injunction; application and proceedings

Sec. 4. The purpose of this Act being to promote the health, recreation and welfare of the people of this state, the operation of any business whether by any individual, partnership or

corporation contrary to the provisions of this Act is declared to be a public nuisance and any person may apply to any court of competent jurisdiction for and may obtain an injunction restraining such violation of this Act. Such proceedings shall be guided by the rules of other injunction proceedings.

Occasional sales

Sec. 5. Occasional sales of any item named herein by a person not engaged in the business of selling such item shall be exempt from this Act.

Legislative intent

Sec. 5a. It is the intent of the Legislature that Articles 286 and 287 of the Penal Code of Texas are not to be considered as repealed by this Act; provided, however, that the provisions of said Articles shall not apply to sales of items listed in Section 1 of this Act which are forbidden to be sold on the day or days named in this Act.

QUESTIONS PRESENTED

1. Whether a state statute that lists categories of articles and goods and prohibits their sale on both of the two consecutive days of Saturday and Sunday deprives merchants to whom it applies of liberty or property without due process of law in violation of the Fourteenth Amendment because it bears no rational relationship to the legitimate legislative purpose of so-called Sunday closing laws, *i.e.*, to provide for a common day of rest and tranquillity.

2. Whether such a statute denies to merchants to whom it applies the equal protection of the laws be-

cause it subjects their businesses to rules and sanctions different from those applicable to other businesses and there is no rational basis for the classification in view of the purpose and effect of the statute establishing it.

3. Whether a criminal statute that lists, without definition, nearly 50 categories of articles and goods, a number of them not self-defining, and forbids their sale on the two consecutive days of Saturday and Sunday deprives merchants to whom it applies of liberty or property without due process of law in violation of the Fourteenth Amendment because it is so vague as not to give them fair warning of what conduct on their part is proscribed.

STATEMENT

The facts concerning Article 286a of the Penal Code of Texas, its purpose, its sanctions and its relationship to Texas' Sunday closing laws are set out in the Jurisdictional Statement in *Spartan's Industries, Inc.* v. *Texas,* No. 1255 of this Term.

In this case a district attorney and the City Attorney of Abilene sued to enjoin appellants from selling merchandise in violation of Article 286a. Appellant M. N. Landau Stores, Inc., operates Clark's Discount Store in Abilene. Appellant Sundaco, Inc., is an unrelated corporation that has an agreement with Landau to engage in retail operations from the Clark's location on Sunday. In their injunction suit the state and local authorities took the position that by this arrangement the two corporations were violating Article 286a. The appellants defended on the ground that Article 286a applies only to Saturday and Sunday sales by the same person and Landau and Sun-

daco are bona fide separate corporations and on the further ground, among others, that Article 286a is unconstitutional as in violation of the due process clause and the equal protection clause of the Fourteenth Amendment to the United States Constitution. On the basis of stipulations and admissions of certain facts both sides moved for summary judgment. The trial court held that Article 286a "is vague, and indefinite, and therefore unconstitutional," and on that basis granted appellants' motion for summary judgment. (Tr. 130).

On appeal the Court of Civil Appeals reversed the trial court. It upheld the constitutionality of the statute generally and specifically held that it was not void for vagueness. The appellants renewed their constitutional claims in an application to the Texas Supreme Court for a writ of error. (See Document No. I). That court denied the application. It also denied a motion for rehearing on the same day that it handed down its decision in *State* v. *Spartan's Industries, Inc.*, No. B-1255, (in this Court as No. 1255 of this Term), which finally concluded all of the federal constitutional claims asserted by appellants here, though certain state questions remain open on remand. Compare *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The substantiality of the questions presented is demonstrated in the discussion under that heading in the Jurisdictional Statement in *Spartan's Industries, Inc.* v. *Texas*, No. 1255 of this Term. The Court's attention is respectfully invited to that discussion, on which appellants here rely.

CONCLUSION

Probable jurisdiction should be noted and the case set down for plenary hearing on the merits.

Respectfully submitted,

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